

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1287 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

ANANTRAI DALPATRAM TRIVEDI

Versus

TRIVEDI SHIRISHKUMAR RATILAL

Appearance:

MR SS BELSARE for Petitioner

MR HARIN P RAVAL for Respondent No. 1

SERVED for Respondent No. 2

CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 03/07/97

ORAL JUDGEMENT

1. This CRA is filed by the original obstructionist in Darkhast No.9/87 challenging the legality and validity of the order passed below Darkhast No.9/87 wherein the executing court has taken the view that the 3rd party-obstructionist, though has taken objections against the execution of decree, same can not be decided by the

executing court. It appears that in Reg.C.S.No.473/86 filed by the executor against Tansukhrai Laxmichand Gundigara for possession of suit premises on various grounds including the ground of subletting. The trial court passed the decree against Tansukhrai Laxmichand. In the execution proceedings Anantra Dalpatram Trivedi filed objection to the execution of the decree at Exh.8 and the executing court has gone through various objections raised in said reply. The executing court has taken the view that the obstructionist Anantra Dalpatram Trivedi is a third party and that he has not produced any evidence showing that his father was the tenant or that there was any rent note or anyother documentary evidence in his possession. The court also has found that the third party-obstructionist was not a party to the suit and that he has no legal right to obstruct the execution of decree. The court also found that there was no documentary evidence produced to show that the obstructionist was in lawful possession of the property and that he was a third party only. The court also observed in the course of its order that a person who is not a party to the suit for decree has no right to obstruct the decree of possession by filing objection and such objections, even if raised, are not legally maintainable, and enquiry is required to be held into such objections raised by the obstructionist. The court, therefore, directed the execution proceedings to proceed further and to execute the warrant for possession which was hitherto stayed by the executing court. It is the aforesaid order passed by the executing court which is under challenge before this court.

2. Mr.S.S.Bulsara, Ld.advocate for petitioner has submitted that the case is squarely governed by the provisions of Order 21 Rules 97-103 and more particularly in the light of the decision rendered by this court in the case of CHANDRAVATI COOP.HOUSING SOCIETY LTD, MANINAGAR vs BHAIKAVANATH EDUCATION 7 CULTURAL SOCIETY reported in 34(1)GLR 116 wherein this court has after considering the entire scheme of the Order 21 Rules 97-103 propounded the law and as per the statement made at the Bar the said decision of this court is not up-turned by the higher court or by the Division Bench of this court. The law laid down by this court in the aforesaid decision as summarised in the head-note of the said reported decision reads as under:

"When the holder of a decree for possession was obstructed by a third party, Rule 97 provides him a remedy to apply to the court complaining of

such resistance or obstruction and sub-rule (2) of Rule 97 which is substituted for old sub-rule (2) provides that the court shall proceed to adjudicate upon the application in accordance with the provisions contained therein. The sub-rule (2) of Rule 97 is major departure from the scheme of removal of obstruction enacted under Old Rule 97. It is pertinent to note that once such application is given by the holder of decree for possession, the Executing court is obliged to proceed to adjudicate upon the application. The use of the word "shall" proceed to "adjudicate" leave no room for doubt that the exercise which the court is to undertake is that of adjudicating the claim of the parties. The legislature has by introduction of the aforesaid sub-rule (2c) of Rule 97 substituted the summary remedy provided to a decreeholder by a full-fledged adjudication proceeding and the order made therein has the force of the decree and is subject to an appeal. It, therefore,

becomes clear that remedy which is provided to a holder of a decree for possession of immovable property under Rule 97 Order 21 is now a substantive remedy wherein even adjudication of right, title and interest of the obstructor can be gone into by the executing court in view of the language employed in Rule 101 of Order 21 of Civil Procedure Code. It may be mentioned that over and above the remedy provided by Rule 97(2) it is open to him to file a regular suit for possession when obstruction is by a third party.

The holder of a decree for possession can also resort to remedy of instituting an independent suit to recover possession of the property against such third party in possession. This remedy is even otherwise available to a holder of a decree for possession under ordinary Civil law and the same is not and can not be barred. This remedy is over and above the remedy provided by Order 21 Rule 97(2) of Civil Procedure Code. When he resorts to this remedy which under the amended provision is no longer a summary remedy the warrant for possession as against the third party is not executed.

Under the Old Law the power of the executing court was a limited power. It did not possess the power to decide questions relating to right, title or interest in the property. Now

such power is conferred on the executing court under this rule and as observed hereinabove the power of adjudication is a substantial power and the procedure to be followed by the executing court is that of a regular trial because its order is to be treated as a decree under Order 21 Rule 193 Civil Procedure Code. Against such decree regular appeal can be preferred and therefore both the holder of a decree for possession as well as a person who has offered resistance or made obstruction are fully protected and full-fledged trial is contemplated followed by a right of a substantive First Appeal.

It also becomes abundantly clear that though the remedy of instituting a separate suit challenging the legality and validity of decree is available to a third party over and above the remedy of filing obstruction application under Order 21 Rule 97 Civil Procedure Code the executing court is not expected, and in fact, not required to stay the proceedings under Order 21 Rule 97(2) till such independent suit filed by the third party is decided. Section 10 of Civil Procedure Code has no application to such execution proceedings. In fact, to stay the proceedings under Order 21 Rule 97 of Civil Procedure Code would amount to rendering the amendment in the aforesaid provisions absolutely meaningless and ineffective. The legislature has provided effective remedy to third party of complete adjudication of right, title and interest of the parties in the execution proceedings itself and it is expected that the executing court itself shall expeditiously decide such right, title and interest of the parties. Therefore, in my opinion, the executing court has no jurisdiction, whatsoever, to stay such proceedings and any attempt to import the provisions of Section 10 Civil Procedure Code to such proceedings would frustrate the legislative intent".

3. From the aforesaid proposition of law in my opinion the judgment and order of the executing court made in the present case was not and is not at all maintainable and is liable to be quashed and set aside and the executing court is directed to decide the obstructions raised by the obstructionist in the manner suggested by this court in the case of Chandravati

4. Mr.H.P.Raval, learned advocate for respondent has however submitted that the order passed by the Executing Court is an appealable order under Rule 103 of Order 21 and that the CRA is not maintainable. In my opinion, the objection is simply required to be noted for the purpose of being rejected as right to appeal would arise only in case the objections are gone into and decided as envisaged by the provisions of Rules 97-102 Order 21 of C.P.Code. Unfortunately, in the present case the executing court has taken the view that it has no jurisdiction whatsoever to decide the objections raised by the obstructionist. In that view of the aforesaid, present CRA is allowed, and the judgment and order of the Ist Jt.Civil Judge(JD), Bhavnagar, dated 7.10.92 is quashed and set aside and executing court is hereby directed to proceed further with the obstruction of the obstructionist as directed in the aforesaid decision of this court. Rule is made absolute accordingly to the aforesaid extent. No costs.

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